

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS LAYTON,

Plaintiff,

vs.

GREEN VALLEY VILLAGE COMMUNITY)
ASSOCIATION d/b/a GREEN VALLEY)
VILLAGE HOA, ASSURED REAL ESTATE,))
INC., AND JOSEPH YAKUBIK,)

Defendants.

Case No.: 2:14-cv-01347-GMN-EJY

ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 66), filed by Defendant Green Valley Village Community Association (“GVV”) and Assured Real Estate, Inc. (“Assured”). Plaintiff Thomas Layton (“Plaintiff”) filed a Response, (ECF No. 77), and Defendants GVV and Assured filed a Reply, (ECF No. 82).

Also pending before the Court is the Motion to Dismiss, (ECF No. 84), filed by Defendant Joseph Yakubik (“Yakubik”). Plaintiff, appearing *pro se*,¹ filed a Response, (ECF No. 116), and Defendant Yakubik filed a Reply, (ECF No. 117).

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¹ The Court is obligated to hold a pro se litigant to a different standard than a party who is represented by counsel. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The pleadings of a pro se litigant are “to be liberally construed” and “however inartfully pled, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976)). However, the pro se litigant “should not be treated more favorably” than the party who is represented by counsel. *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

Though Plaintiff had counsel respond to Defendants GVV and Assured’s Motion to Dismiss, (ECF No. 66), Plaintiff moved to substitute attorney and proceed pro se in May 2022. (*See* Mins. Proceeding, ECF No. 111). At that point, because Plaintiff had not yet filed a Response to Defendant Yakubik’s Motion to Dismiss, (ECF No. 84), and Motion for Sanctions, (ECF No. 85) before the stay, the Court granted an extension for Plaintiff to respond. (*See* Mins. Proceeding, ECF No. 105).

1 Also pending before the Court is Motion to Dismiss, (ECF No. 85), filed by Defendant
2 Joseph Yakubik. Plaintiff filed a Response, (ECF No. 116), and Defendant Yakubik filed a
3 Reply, (ECF No. 117).

4 For the reasons discussed herein, Defendants GVV and Assured's Motion to Dismiss
5 is **GRANTED IN PART** and **DENIED IN PART**, Defendant Yakubik's Motion to Dismiss is
6 **GRANTED**, and Defendant Yakubik's Motion to Seal is **DENIED**.

7 **I. BACKGROUND**

8 This case arises from Defendants GVV, Assured, and Yakubik's (collectively,
9 "Defendants") alleged unfair debt collection from Plaintiff who owned property inside Green
10 Valley Village. (*See* Second Am. Compl. ("SAC"), ECF No. 54). Plaintiff alleges that GVV
11 sent numerous confusing demands for payment prior to January 28, 2011. (*Id.* ¶ 12). Plaintiff
12 refused to pay. (*Id.* ¶ 13). In October 2012, Assured began demanding payment from Plaintiff
13 on behalf of GVV. (*Id.* ¶¶ 18–23). On November 19, 2013, Assured recorded a Notice of
14 Default and Election to Sell, claiming \$2,009.03. (*Id.* ¶ 24). The next month, Assured also sent
15 Plaintiff a demand for payment of \$636.98. (*Id.* ¶ 25). Though he was confused about the
16 various demands, Plaintiff paid \$636.98 to Assured. (*Id.* ¶ 26).

17 In March 2014, Assured made another demand for payment of \$1,527.55. (*Id.* ¶ 29).
18 Plaintiff did not pay that amount, so Assured filed a lawsuit in state court. (*Id.* ¶ 31). In August
19 2013, Plaintiff then filed the instant lawsuit against Defendants, asserting claims against GVV
20 and Assured for (1) violations the Fair Debt Collection Practices Act (the "FDCPA"), (2)
21 invasion of privacy, (3) gross negligence, and (4) civil conspiracy. (Compl., ECF No. 4).
22 Plaintiff subsequently amended his complaint to include Defendant Yakubik. (Am. Compl.,
23 ECF No. 16). On November 11, 2014, Defendants filed the current pending motion to dismiss,
24 arguing that this Court lacks jurisdiction. (MTD 3:1–14, ECF No. 27). This Court granted the
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1 Motion to Dismiss and stayed the case until Plaintiff exhausted his administrative remedies
2 before the Nevada Real Estate Division. (*See* Order Granting MTD, ECF No. 51).

3 On January 30, 2017, Plaintiff then filed a Second Amended Complaint, (ECF No. 54).
4 Defendants GVV and Assured then filed the instant Motion to Dismiss, (ECF No. 66).
5 Defendant Yakubik then filed the instant Motion to Dismiss, (ECF No. 84), and Motion for
6 Sanctions, (ECF No. 85).² The Court discusses each in turn.

7 **II. LEGAL STANDARD**

8 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
9 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
10 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
11 which it rests, and although a court must take all factual allegations as true, legal conclusions
12 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
13 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
14 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
15 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
16 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
17 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
18 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
19 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

20 “Generally, a district court may not consider any material beyond the pleadings in ruling
21 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
22 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the
23 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a
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25 ² In April 2022, Plaintiff filed a Motion to Lift Stay of the Case, (ECF No. 102), which this Court granted on
April 24, 2022, as Defendants did not oppose the stay. (*See* Min. Order Granting Motion to Lift Stay, ECF No.
104).

complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. DISCUSSION

The Court first addresses the Motion to Dismiss filed by Defendants GVV and Assured before turning to Defendant Yakubik’s Motions.

A. MOTION TO DISMISS FILED BY DEFENDANTS GVV AND ASSURED, (ECF NO. 66)

Defendants GVV and Assured move to dismiss all Plaintiff’s claims against them, which include: (1) violations of the Fair Debt Collection Practices Act (the “FDCPA”), (2) invasion of privacy, (3) gross negligence, and (4) civil conspiracy. (SAC ¶¶ 43–56). The Court reviews each claim below.

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1 1. FDCPA Claim

2 Defendants GVV and Assured argue that Plaintiff’s FDCPA claim against them must be
3 dismissed because GVV is not a “debt collector” as defined under the FDCPA and Assured is
4 merely an agent acting on behalf of GVV. (Mot. Dismiss 5:15–7:23). Citing to Nevada case
5 law, Defendants GVV and Assured claim that similar cases have held that HOAs are not
6 considered “debt collectors” under the FDCPA. (*Id.*). Plaintiff, in response, asserts that similar
7 cases also assert that HOAs are considered “debt collectors” such that claims for FDCPA
8 violation may proceed against HOAs, like GVV. (Resp. to Mot. Dismiss 5:10–7:14).

9 A debt collector, as defined under the FDCPA, is “any person who uses any
10 instrumentality of interstate commerce or the mails in any business the principal purpose of
11 which is the collection of any debts, or who regularly collects or attempts to collect, directly or
12 indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6).
13 This includes “any creditor who, in the process of collecting his own debts, uses any name
14 other than his own which would indicate that a third person is collecting or attempting to
15 collect such debts.” *Id.* “The FDCPA imposes liability only when an entity is attempting to
16 collect debt.” *Vien-Phuong Thi Ho v. Recontrust Co., NA*, 840 F.3d 618, 621 (9th Cir. 2016).

17 As the parties point out in their briefing, courts have treated HOAs differently for
18 purposes of the FDCPA. Some courts consider HOAs as debt collectors under the FDPCA.
19 *See e.g., Calvert v. Alessi & Koenig, Ltd. Liab. Co.*, No. 2:11-CV-00333-LRH-PAL, 2013 U.S.
20 Dist. LEXIS 20017, at *12 (D. Nev. Feb. 12, 2013) (finding Alessi & Koenig a debt collector
21 “so long as they were not ‘actively engaged in an attempt to dispossess [Calvert] of secured
22 property”). Other courts have determined that an HOA is not a “debt collector” because “it
23 only ever attempts to collect its own debts.” *See e.g., Mendez v. Fiesta Del Norte Home Owners*
24 *Ass’n*, No. 2:15-cv-00314-RCJ-NJK, 2016 U.S. Dist. LEXIS 88764, at *18 (D. Nev. July 7,
25 2016). A sister court in this district persuasively explained:

1 When the debt collection process masquerades as the foreclosure process,
 2 however, the reasons for subjecting the two processes to different regulations fall
 3 apart. First, the FDCPA explicitly disapproves of threats to foreclose when there
 4 is no “present intention” to do so—in other words, when the threats operate as tools
 5 of debt collection rather than of security-interest enforcement. 15 U.S.C. §
 6 1692f(6)(B). Second, debtors subject to empty foreclosure threats are not
 protected by state foreclosure laws. By hypothesis, these empty threats have not
 engaged the machinery of foreclosure and its attendant protections, leaving the
 debtor exposed to potential abuse.

7 *Calvert v. Alessi & Koenig, Ltd. Liab. Co.*, No. 2:11-CV-00333-LRH-PAL, 2013 U.S. Dist.
 8 LEXIS 20017, at *9 (D. Nev. Feb. 12, 2013). In *Mashiri v. Epsten Grinnell & Howell*, 845
 9 F.3d 984 (9th Cir. 2017), the Ninth Circuit considered whether a law firm, who attempted to
 10 collect payment of a debt on behalf of an HOA, constituted a debt collector under the FDCPA.
 11 845 F.3d at 989. There, the Ninth Circuit clarified that a trustee, who merely informed the
 12 property owner of the foreclosure timeline, was not liable under the FDCPA because she was
 13 not attempting to collect payment, whereas an entity who seeks to enforce a secured loan is
 14 held to the full force of the FDCPA. *Id.* at 990. (“[W]here an entity is engaged solely in the
 15 enforcement of a security interest and not in debt collection, like the trustee and unlike Epsten,
 16 it is subject only to § 1692f(6) rather than the full scope of the FDCPA.”). Ultimately, the
 17 Ninth Circuit held that the law firm attempting to collect payment of a debt, “irrespective of
 18 whether it also sought to perfect the HOA’s security interest and preserve its right to record a
 19 lien in the future . . . is subject to” the FDCPA. *Id.*

20 Following the Ninth Circuit’s published opinion in *Mashiri*, the Court finds that Plaintiff
 21 plausibly alleges sufficient facts to show that GVV and Assured are both “debt collectors”
 22 under the FDCPA. *See id.* Plaintiff alleges both GVV and Assured attempted to collect
 23 payment of fees, like the firm in *Marshiri*. (SAC ¶¶ 7, 12). Specifically, Plaintiff claims that
 24 GVV sent “numerous varied and confusing demands for payment.” (*Id.* ¶ 12). He also claims
 25 that Assured is “a debt collector” as defined by 15 U.S.C. § 1692a(6) and that Assured

1 “routinely made written demands for payment” to the point where Assured recorded a Notice of
 2 Default and Election to Sell. (*Id.* ¶¶ 7, 23, 24). Because both are “debt collectors,” they are
 3 thus subject to the FDCPA.³ The Court accordingly denies Defendant GVV and Assured’s
 4 Motion to Dismiss as to Plaintiff’s FDCPA claim.

5 **2. State Claims**

6 Defendants GVV and Assured further argue that Plaintiff fails to allege sufficient facts
 7 to allege plausible state claims for invasion of privacy, gross negligence, and civil conspiracy.
 8 (Mot. Dismiss 8:1–9:7). Plaintiff argues that he has provided sufficient information and as
 9 such, his state claims are plausibly pled. (Resp. to Mot. Dismiss at 9).

10 As the Court explained above, a complaint must contain sufficient factual matter,
 11 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
 12 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
 13 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
 14 that the defendant is liable for the misconduct alleged.” *Id.* Here, Plaintiff fails to plead
 15 plausible state law claims against Defendants GVV and Assured. In her Second Amended
 16 Complaint, Plaintiff largely recites the elements of the claim without factual allegations specific
 17 to this case. For example, as to Plaintiff’s invasion of privacy claim, Plaintiff merely recites
 18 that “[t]he foregoing acts and omissions of Defendants constitute unreasonable debt collection
 19 practices in violation of the doctrine of Invasion of Privacy.” (SAC ¶ 47). “A cause of action
 20 for invasion of privacy requires: (1) an intentional intrusion by defendant; (2) on the solitude or
 21 seclusion of the plaintiff; (3) that would be highly offensive to a reasonable person.” *Downs v.*

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 25 ³ Defendants further argue that Assured is exempt from the FDCPA because it attempted to collect debt on
 behalf of GVV. (Mot. Dismiss 6:21–7:22). However, the cases Defendants rely on are not binding as they are
 from the Fourth, Seventh, and Eleventh Circuits. (*Id.* at 7). The one Ninth Circuit case Defendants cite to, *Rowe*
v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1034, distinguishably finds that a guaranty agency and the DOE
 have a fiduciary/beneficiary relationship. This holding is inapplicable to the present case. As Plaintiff alleges in
 her Complaint, Assured is a “debt collector” and as such, is held to the FDCPA.

1 *River City Grp., LLC*, No. 3:11-CV-0885-LRH-WGC, 2012 U.S. Dist. LEXIS 66860, 2012 WL
 2 1684598, at *4 (D. Nev. May 11, 2012). While Plaintiff provides some additional information
 3 in her Response, Plaintiff did not include these critical allegations in his Second Amended
 4 Complaint. (SAC ¶¶ 46–48). He fails to even recite the elements of an invasion of privacy
 5 claim, which is below the bare minimum required under *Twombly* and *Iqbal*. The Court
 6 accordingly grants Defendants GVV and Assured’s Motion to Dismiss as to Plaintiff’s state
 7 claims with leave to amend.

8 **B. MOTION TO DISMISS FILED BY DEFENDANT YAKUBIK, (ECF NO.**
 9 **84)**

10 Defendant Yakubik argues that Plaintiff’s claims against him must be dismissed because
 11 Yakubik is merely an agent of Assured. (Yakubik’s Mot. Dismiss at 4–5). Because Plaintiff
 12 has not alleged an alter ego allegations, Yakubik argues that he is insulated from liability. (*Id.*).

13 15 U.S.C. § 1692a(6)(A) explicitly exempts “any officer or employee of a creditor,
 14 while in the name of the creditor, collect[s] debts for such creditor.” NRS 78.747 similarly
 15 states that “no stockholder, director or officer of a corporation is individually liable for a debt
 16 or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of
 17 the corporation.” NRS 78.747(1). In his Second Amended Complaint, Plaintiff specifically
 18 alleged that Yakubik is the “President, Secretary, Treasurer and Director of” Assured. (SAC ¶
 19 8). Plaintiff, who filed a response to Yakubik’s Motion to Dismiss *pro se*, seemingly argues an
 20 alter ego claim. He claims that “[t]he fact that Yakubik is a Real Estate Broker and Investor
 21 and controls the HOA and their foreclosures is a conflict of interest.” (Resp. to Yakubik’s Mot.
 22 Dismiss ¶ 4). He goes on to assert that “Yakubik made several statements directly to Plaintiff
 23 that clearly points to his intent to personally benefits from his actions as an HOA servicer.”
 24 (*Id.*). These assertions seemingly raise an alter ego claim. However, because these assertions
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1 are not included in the operative complaint, the Court thus dismisses Plaintiff's claims against
2 Yakubik with leave to amend.

3 **C. MOTION FOR SANCTIONS, (ECF NO. 85)**

4 Defendant Yakubik throws in, at the end of his Motion to Dismiss, that he is entitled to
5 sanctions "[b]ecause Layton refused Yakubik's demand to withdraw this frivolous claims."
6 (Yakubik's Mot. Dismiss 5:9–10). District courts have inherent power to sanction a party for
7 improper conduct. *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). The court may only issue
8 sanctions under its inherent power upon finding "bad faith or conduct tantamount to bad faith."
9 *Id.* at 994. Bad faith, or conduct tantamount to bad faith, encompasses "a variety of types of
10 willful actions, including recklessness when combined with an additional factor such as
11 frivolousness, harassment, or an improper purpose." *Id.* Upon a finding of bad faith, the
12 decision to issue sanctions is within the court's discretion. *Air Separation, Inc. v. Underwriters*
13 *at Lloyd's of London*, 45 F.3d 288, 291 (9th Cir. 1995). Here, the Court does not find any bad
14 faith on Plaintiff's part. Defendant Yakubik also does not explain how Plaintiff's refusal
15 amounts to sanctionable conduct. Accordingly, the Court denies Defendant Yakubik's Motion
16 for Sanctions.

17 **D. LEAVE TO AMEND**

18 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to "freely give
19 leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The Ninth Circuit "ha[s]
20 held that in dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should
21 grant leave to amend even if no request to amend the pleading was made, unless it determines
22 that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*,
23 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
24 1995)).
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1 The Court finds that Plaintiff may be able to plead additional facts to cure the
2 deficiencies identified herein. Accordingly, the Court will grant Plaintiff leave to file an
3 amended complaint. Plaintiff shall file his amended complaint within twenty-one (21) days of
4 the entry of this Order.

5 **V. CONCLUSION**


6 **IT IS HEREBY ORDERED** that Defendant GVS and Assured's Motion to Dismiss,
7 (ECF No. 66), is **GRANTED IN PART** and **DENIED IN PART**.

8 **IT IS FURTHER ORDERED** that Defendant Yakubik's Motion to Dismiss, (ECF No.
9 84), is **GRANTED**.

10 **IT IS FURTHER ORDERED** that Defendant Yakubik's Motion for Sanctions, (ECF
11 No. 85), is **DENIED**.

12 **IT IS FURTHER ORDERED** that if Plaintiff elects to amend his claims that are
13 dismissed with leave to amend, Plaintiff shall have twenty-one days from the date of this Order
14 to do so.

15 **DATED** this 9 day of September, 2022.

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19 Gloria M. Navarro, District Judge
20 UNITED STATES DISTRICT COURT
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